

RECOVERY ALLOWED FOR INJURY TO NON-VIABLE FETUS

Bennett v. Hymers,
147 A.2d 108 (N.H. 1958)

Until recently no rule of the common law seemed more firmly entrenched than that a fetus subsequently born alive could not maintain an action to recover for prenatal injuries. Clearly enunciated by Justice Holmes in 1884,¹ the rule was recognized and followed by a succession of cases both in this country² and abroad.³ Harkening to a few dissenting voices⁴ and the instruction of modern medical science,⁵ the Ohio Supreme Court boldly initiated a reversal of the rule by its holding in *Williams v. Marion Rapid Transit, Inc.*,⁶ permitting recovery by a child through its next friend for injuries sustained as a viable fetus. In logical extension of the *Williams* reasoning the court in the principal case permitted plaintiff to recover for "prenatal injuries inflicted upon it by the tort of another even [though] it had not reached the state of a viable fetus at the time of injury."⁷

The common law rule denying compensation for prenatal injuries had a dual basis: (1) the defendant could owe no duty to a person not in existence; and (2) the difficulty of proving the causal connection

¹ Dietrich v. Northampton, 138 Mass. 14 (1884).

² See, e.g., Stanford v. St. Louis S.F. Ry., 214 Ala. 611, 108 So. 566 (1926); Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900); Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Buel v. United Rys., 248 Mo. 126, 154 S.W. 71 (1913); Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940); Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901); Magnolia Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935); Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916).

³ Walker v. Great Northern R.R., 28 L.R. Ir. 69 (1891).

⁴ Allaire v. St. Luke's Hosp., 184 Ill. 359, 368, 56 N.E. 638, 640 (1900) (dissenting opinion); Stemmer v. Kline, 128 N.J.L. 455, 463, 26 A.2d 489, 685 (1942) (dissenting opinion); Montreal Tramways v. Le Veille, 4 D.L.R. 337 (Can. 1933). The court cited with favor Scott v. McPheeters, 93 P.2d 562 (Cal. 1939), distinguishable from *Williams* in that it was a case of statutory interpretation. Curiously, the court overlooked the sole opinion in the United States to have preceded it in reversing the common law rule. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

⁵ ". . . [M]edical authority has recognized long since that the child is in existence from the moment of conception. . . ." PROSSER, TORTS § 36, at 174 n.65 (2d ed. 1955), citing HERZOG, MEDICAL JURISPRUDENCE §§ 860-975 (1931), and MALOY, LEGAL ANATOMY & SURGERY 669-87 (1930).

⁶ 152 Ohio St. 114, 87 N.E.2d 334 (1949), 10 A.L.R.2d 1051 (1950), 63 HARV. L. REV. 173 (1949), 48 MICH. L. REV. 539 (1950).

⁷ Bennett v. Hymers, 147 A.2d 108, 110 (N.H. 1958).

between negligence and injury would create the danger of a multitude of fictitious claims.⁸

In refuting the first basis of the rule, *Williams* and similar decisions⁹ emphasized that a viable fetus was capable of independent existence¹⁰ and thus was a person to whom other persons could owe a duty of due care. The second basis of the rule, posing merely a problem of proof, was easily overcome:

. . . [T]he fear that recognition of a right of action in a case of this character will lead to others brought in bad faith and present insuperable difficulties of proof should not influence the decision of the question. *It is to be hoped that the law will keep pace with science.* . . .¹¹

The foundation of the rule having been undermined, a series of thirteen jurisdictions¹² adopted the "viability" rule in the decade which followed the *Williams* decision.

This calculated refusal to follow the common law rule is a remarkable demonstration of "judicial application of reason to experience,"¹³ but it was merely the first of two steps which were totally to obliterate the rule. The final step was signalled by an appellate court in *Kelly v. Gregory*,¹⁴ recognized in *Hornbuckle v. Plantation Pipe*

⁸ PROSSER, TORTS § 36, at 174 (2d ed. 1955).

⁹ See Annots., 27 A.L.R.2d 1256 (1953), 10 A.L.R.2d 1051 (1950). See also, *Jasinsky v. Potts*, 153 Ohio St. 529, 92 N.E.2d 809 (1950) (wrongful death action).

¹⁰ "Viable—Capable of living; especially said of a fetus that has reached such a stage of development that it can live outside of the uterus." DORLAND, AMERICAN ILLUSTRATED MEDICAL DICTIONARY 1528 (23d ed. 1957). "Viability is generally taken to range between the twenty-sixth and the twenty-eighth week of fetal life." GRADWOHL, LEGAL MEDICINE 834 (1954). "An infant is usually considered to be viable at the end of seven months of intrauterine existence, but infants may survive if born at an earlier period." GORDON, TURNER & PRICE, MEDICAL JURISPRUDENCE 760 (1953).

¹¹ *Williams v. Marion Rapid Transit, Inc.*, *supra* note 6, at 125-26, 87 N.E.2d at 339. (Emphasis added.)

¹² Connecticut, Delaware, District of Columbia, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, New Hampshire, New York, Ohio and Oregon; recovery for prenatal injuries is still denied in seven jurisdictions whose appellate courts have not reviewed the question since 1946: Alabama, Michigan, New Jersey, Pennsylvania, Rhode Island, Texas and Wisconsin. 26 INS. COUNSEL J. 148, 151 (1959). California and Massachusetts have recently reconsidered the problem and denied recovery. *Norman v. Murphy*, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); *Cavanaugh v. First Nat'l Stores*, 329 Mass. 179, 107 N.E.2d 307 (1952).

¹³ "The law of tomorrow . . . will be made as law in living and growing societies has always been made, by juristic and judicial application of reason to experience of the administration of justice in the past and testing of that reason by further experience. . . ." Pound, *Law and Laws*, 19 OHIO ST. L.J. 441, 453 (1958).

¹⁴ 282 App. Div. 542, 125 N.Y.S.2d 96 (1953).

Line Co.,¹⁵ and forcefully taken by the New Hampshire Supreme Court in *Bennett*.¹⁶

In *Woods v. Lancet*¹⁷ the New York Court of Appeals reversed its earlier decision in *Drobner v. Peters*¹⁸ and subscribed to the "viability" rule. The court specifically confined its holding to "prepartum injuries to . . . viable children." Thus, *Drobner* had never been totally discredited when the intermediate court in *Kelly*¹⁹ permitted recovery for injuries to a non-viable fetus without mentioning *Drobner*. Apparently never having been appealed, the *Kelly* case is at best uncertain authority.

In the only decision by a state supreme court prior to *Bennett* to dispose of the "viability" distinction and permit recovery for injury to a non-viable fetus, the *Hornbuckle*²⁰ court relied upon a "viability" case²¹ and a property case.²² Justice Almand dissented on the ground that the former was strictly limited to circumstances in which the fetus is "quick"²³ in the mother's womb. Chief Justice Duckworth, author of the *Tucker* opinion, pointed out that it "went as far as sound logic and legal principles will permit."²⁴ But, ignoring the closely reasoned "viability" distinction enunciated by an unanimous court in *Tucker*, the *Hornbuckle* majority recognized a cause of action in a non-viable fetus simply by dusting off the old property rule that an infant *en ventre sa mere* is "considered as born for all purposes which are for his benefit."²⁵

Kelly and *Hornbuckle*, although of questionable validity, nevertheless heralded the demise of the "viability" distinction—an event urged by legal commentators.²⁶ It remained for the court in the principal case

¹⁵ 212 Ga. 504, 93 S.E.2d 727 (1956).

¹⁶ *Supra* note 7.

¹⁷ 303 N.Y. 349, 102 N.E.2d 691 (1951).

¹⁸ *Supra* note 2.

¹⁹ *Supra* note 14.

²⁰ *Supra* note 15.

²¹ *Tucker v. Carmichael & Sons*, 208 Ga. 201, 65 S.E.2d 909 (1951).

²² *Morrow v. Scott*, 7 Ga. 535 (1849).

²³ *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 506, 93 S.E.2d 727, 729 (1956) (dissenting opinion). "Quick" to the *Tucker* court meant "when the child is able to stir in the mother's womb." 208 Ga. at 204, 65 S.E. 2d at 910.

²⁴ *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 505, 506, 93 S.E.2d 728 (1956) (concurring opinion).

²⁵ *Morrow v. Scott*, *supra* note 22, at 537. "It is now settled, both in England and in this country, that from the time of conception the infant is in being for the purpose of taking any estate which is for his benefit. . . ." 16 AM. JUR. *Descent and Distribution* § 81, at 852 n.8 (1938). See also, 26A C.J.S. *Descent and Distribution* § 29 (1956).

²⁶ PROSSER, *TORTS* § 36, at 175 (2d ed. 1955); 39 CORNELL L.Q. 542, 545-46 (1954); 63 HARV. L. REV. 173-74 (1949); 29 N.Y.U.L. REV. 1154, 1157 (1954); 32 NOTRE DAME LAW. 341, 343-45 (1957); 3 VAND. L. REV. 282, 296 (1950). But see 8 SYRACUSE L. REV. 115 (1957).

to face the question squarely.²⁷ So doing, it (1) adopted the opinion that the fetus²⁸ becomes a separate organism from the time of conception, (2) pointed out that its legal existence is recognized by both property²⁹ and criminal law,³⁰ (3) observed that difficulty of proof should not bar recovery for a wrong if the evidence meets the usual tests required in tort cases, and (4) concluded that:

In weighing the factors for and against allowing recovery we are impressed with the injustice of denying to a child born alive a right to recover for injuries which he might bear for the remainder of his life because of the tortious conduct of another.³¹

Although speaking of the child's "right to recover," the court basically is determining that an embryo-fetus possesses an interest which the law will recognize and protect. Medical science tells the court that "when the male and female pronucleus meet it is called conception, and when this occurs *life begins*."³² Having accepted this teaching³³ the court realizes that the interest for which protection is sought is *human life*. Before this, the most jealously protected interest known to the law, opposing considerations of difficulty of proof and fraudulent claims must perish.³⁴

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²⁷ At the outset the court affirmed that a viable child born alive had a cause of action for prenatal injuries. *Poliquin v. MacDonald*, 101 N.H. 104, 107, 135 A.2d 249, 251 (1957).

²⁸ The court did not use the term "fetus" precisely. "The word embryo covers the first three months of life, and fetus is a name for the child in the uterus after the end of the third month." MALOY, *LEGAL ANATOMY AND SURGERY* 740 (2d ed. 1955).

²⁹ See note 25 *supra*.

³⁰ "Without the aid of statutes which now have generally done away with the requirement that in criminal abortion the woman must be quick with child, and provide that the crime may be committed upon any pregnant woman, a few American cases have held that regardless of 'quickening' the offense may be committed at any time during gestation." 3 BURDICK, *CRIME* § 868, at 282 (1946), citing *State v. Reed*, 45 Ark. 333 (1885); *State v. Wilson*, 2 Ohio St. 319 (1853); *Mills v. Commonwealth*, 13 Pa. 630 (1850).

³¹ *Bennett v. Hymers*, *supra* note 7, at 110.

³² MALOY, *supra* note 28, at 738. (Emphasis added.) The embryo is regarded as an entity from the moment of conception. KEITH, *HUMAN EMBRYOLOGY & MORPHOLOGY* 23 (1921). Neither the mother's blood nor her nerves pass into or through it. PATTEN, *HUMAN EMBRYOLOGY* 181 (1946).

³³ "The life of the law has not been logic; it has been experience." HOLMES, *THE COMMON LAW* 1 (1881). "The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow." CARDOZO, *THE GROWTH OF THE LAW* 20 (1924).

³⁴ "It is to be hoped that the law will keep pace with science. . . ." This citation from *Williams*, *supra* note 11, reveals the common motivation between that and *Bennett*. It is clear that the courts, having attacked the common law rule with the aid of medical science in cases such as *Williams*, ultimately will destroy it as they subscribe to the rationale of the principal case.